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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1420

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NASH-FINCH COMPANY, d/b/a JACK AND JILL STORES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 54-63) is reported at 434 F. 2d 971. The memorandum and order of the district court (A. 44-51) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1970 (A. 64). The petition for a writ of certiorari was filed on March 2, 1971, and granted on April 26, 1971 (A. 65). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an agency of the United States is within the governmental exception to the statute which ordinarily prohibits federal courts from enjoining state court proceedings, 28 U.S.C. 2283, so that the National Labor Relations Board may, through proceedings in a federal court, enjoin the implementation of a state court order which regulates peaceful picketing governed exclusively by the National Labor Relations Act.

STATUTES INVOLVED

28 U.S.C. 2283 provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Also relevant are portions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) and of the Nebraska anti-picketing statute (Secs. 28-812, *et seq.*, R.S. Neb. 1964), which are set out in the Appendix, *infra*, pp. 39-43.

STATEMENT

A. The Underlying Facts

In August 1968, District Union 271, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, began an organizing campaign among the meat department employees of the Jack and Jill

("Company") stores in Grand Island, Nebraska (A. 55; 10). In October 1968, the Union filed unfair labor practice charges against the Company alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5). The Board's General Counsel issued a complaint based on the charges (A. 55; 9). In April 1969, after hearing, the Trial Examiner sustained the complaint, finding that the Company had violated the aforementioned provisions of the Act by refusing to bargain with the Union, and by suggesting "the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation" (A. 56; 22). The Trial Examiner recommended that the Company be ordered to cease and desist from the unfair labor practices found and from any like or related conduct, and to bargain with the Union (A. 56; 23).

Approximately one month after issuance of the Trial Examiner's decision, the Union began picketing the Company's stores with signs advising the public that the Union was striking in protest against the Company's unfair labor practices (A. 56; 27, 28). The Union also distributed handbills to passers-by which stated, in part, that the Company had refused to bargain "or comply with other findings and recommendations of a trial examiner of the National Labor Relations Board", and urged members of the

public not to shop at the Company's stores (A. 56; 28, 30).

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for an injunction against the Union, its officers, and certain individual pickets (A. 56-57; 27-30). The petition alleged that the Union was engaging in "mass picketing," in violation of Nebraska law, by picketing with more than two pickets within 50 feet of each other and by blocking entry to and exit from the stores; that, insofar as the signs and handbills represented that a strike existed and that the Company was engaged in unfair labor practice activity, they were false and malicious in further violation of state law; and that the pickets had threatened customers with property loss, had used profane and vulgar language, and had slandered the Company's business reputation (A. 57; 27-28).

The state court issued a temporary restraining order, and then, overruling the Union's motion to vacate, a temporary injunction (A. 57; 31, 7-8). The injunction, which remains in effect, limits pickets to two at each of the Company's stores, and enjoins them from blocking or picketing entrances or exits to the store, and from distributing handbills or literature pertaining to the dispute in any manner which would halt or slow the movement of traffic (A. 7). The injunction also bars (1) anyone other than a bona fide member of the Union from picketing unless that person first submits himself to the jurisdiction of the state court by becoming a defendant in the proceedings; (2) piekets from instigating con-

versations with the Company's customers in any manner relating to the dispute; (3) pickets from "[d]oing any act in violation of Sections 28-812, 28-814.01 and 28.814.02 R.S. Neb. 1964;"[1] and (4) anyone, other than pickets or named defendants, from picketing, distributing handbills, or otherwise "caus[ing] to be published or broadcast any information pertaining to the dispute * * * between the parties" (A. 7-8).

In September 1969, several months after this injunction was obtained, the Board announced its decision accepting in part and rejecting in part the Trial Examiner's recommendations.[2]

B. The Federal Court Proceedings

On August 29, 1969, the Board filed suit in the federal district court in Nebraska for an injunction to restrain the Company from enforcing the provisions of the state court injunction described in (1) to (4), *supra*, on the ground that they regulated conduct which was governed exclusively by the National Labor Relations Act (A. 57; 4-6). The district court denied the Board's motion for a preliminary injunction and granted the Company's motion to dis-

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[1] These provisions are discussed, *infra*, pp. 34-35, n. 16.

[2] The Board sustained the Examiner's Section 8(a)(1) findings and his remedy therefor, but rejected his findings of an unlawful refusal to bargain and the Examiner's recommended bargaining order. Respecting the latter, the Board found the Union's showing of majority status deficient. 178 NLRB No. 77, 72 LRRM 1144. The Company subsequently complied with the Board's decision.

miss the complaint. Although noting that the Union's picketing "may be within the exclusive jurisdiction of the N.L.R.B.," it concluded that it did not "have the power by virtue of the limitations imposed upon it by [28 U.S.C.] section 2283 to issue the [Board's] requested relief" (A. 47, 50). Section 2283, in general, prohibits federal courts from interfering with State court proceedings. The district court rejected the Board's contention that it was within an exception to Section 2283, recognized in *Leiter Minerals* v. *United States*, 352 U.S. 220, for suits brought by the United States (A. 45-46).

The Eighth Circuit affirmed (A. 54-63). Although recognizing "that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings," the court adhered to an earlier holding, *National Labor Relations Board* v. *Swift & Co.*, 233 F. 2d 226, 232, that, "for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States" (A. 58, 59). Since the Board could not avoid the prohibitions of Section 2283 on the basis of any of its other exceptions, an injunction against the state court proceeding was barred (A. 59-63).

SUMMARY OF ARGUMENT

I.

Although 28 U.S.C. 2283 generally prohibits district courts from granting an injunction to stay

proceedings in a state court, the history and interpretation of that provision make clear that it does not apply to suits brought by the United States or its agencies. Section 2283 is only the most recent statement of a principle which has been embodied in the law since the first Judiciary Act. That principle was adopted to reduce the occasions for conflict and friction within a dual court system, and to avoid affording litigants the unqualified right to have state court judgments reviewed in federal district courts. For the federal government and its agencies, on the other hand, federal courts are the natural, if not the exclusive forum, it promotes healthy federal-state relations if they have access to federal courts to enforce paramount federal rights.

Accordingly, judicial interpretation of Section 2283 and its predecessors has developed along two lines. Where private parties have sought federal court injunctions interfering with state court action, this Court, since *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118, has been insistent that any opportunity to obtain such relief is narrowly circumscribed by the statutory exceptions. See also *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511; *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281; *Younger* v. *Harris*, 401 U.S. 37. On the other hand, where injunctive relief was sought by federal governmental authority to enforce its statutory mandate, such suits have uniformly been entertained, whether or not there was a specific statutory provision for them. *E.g.*, *Bowles* v. *Willingham*, 321 U.S. 503; *Capital Service*,

Inc. v. *National Labor Relations Board*, 347 U.S. 501; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220. In the words of a court of appeals which faced the issues before Section 2283 was enacted:

> [W]e do not think that section may properly be construed as forbidding the granting of an injunction to restrain interference by state courts with the enforcement of a federal statute by an agency to which Congress has delegated exclusive power to enforce it. The purpose of that section was to avoid unseemly conflict between the state and federal courts in ordinary litigation between private litigants, not to hamstring the federal government in the use of its own courts in the protection of its rights or the enforcement of its laws. * * * [*Brown* v. *Wright*, 137 F. 2d 484, 488 (C.A. 4).]

Nothing in the enactment of Section 2283 suggests any purpose to eliminate this well-established exception to the anti-injunction rule. Indeed, the opinion which was the principal reliance of the court below, *Amalgamated Clothing Workers, supra*, is careful to set out that the relief in that case was sought by private, not public, parties. Private litigants who assert the public interest may often do so for their own private purpose. To permit federal courts to interfere with state court proceedings at the behest of any interested party not only threatens to multiply court proceedings but also adds

> an element of federal-state competition * * * which may be trusted to be exploited and to complicate, not simplify, existing difficulties [348 U.S. at 519.]

But, for the federal government and its agencies, use of the federal courts is "preferable in the context of healthy federal-state relations." *Leiter Minerals, Inc., supra,* 352 U.S. at 226. When a federal agency invokes injunctive relief, it presents not only an abstract issue of preemption or public policy, but also its own judgment, which is entitled to weight, that in this particular case that issue requires public intervention. That judgment is subject to review, on its merits, but is not foreclosed by Section 2283.

II.

Section 2283 is the only possible barrier to a hearing of the claim for injunctive relief in this case. Since Congress has given the Labor Board exclusive jurisdiction over the subject matter and the intrusion of the state injunction in this case would result in a conflict of functions, the Board's authority to seek an injunction in federal court must be implied, in the absence of any congressional command to the contrary. Such enforcement powers have been implied by this Court in the past. *Capital Service, Inc.* v. *National Labor Relations Board, supra; Bowles* v. *Willingham, supra.* Congress has not made an express grant of authority to the Board for every legal proceeding that may be required in its administration of the Act. Authority to bring suits to carry out or protect statutory policy has been implied with respect to several federal regulatory agencies.

The district court's jurisdiction was properly invoked, 28 U.S.C. 1337, and the Board's complaint is supported by a justiciable interest on its part in re-

moving an unlawful obstacle to the fulfillment of its obligations under the National Labor Relations Act. The supremacy of that Act could be substantially impaired if the Board were unable to check encroachments on its exclusive jurisdiction, as it has sought to do here. The only proper issue is whether the Board has successfully made out a case for injunctive relief in the particular circumstances of this case; that issue was never reached below, since the Court found in Section 2283 an absolute barrier to the provision of such relief. The case should be reversed and remanded for consideration of the Board's request on the merits.

ARGUMENT

I. THE BAN IMPOSED BY 28 U.S.C. 2283 AGAINST ENJOINING STATE COURT PROCEEDINGS IS INAPPLICABLE TO SUITS BROUGHT BY AN AGENCY OF THE UNITED STATES TO RESTRAIN STATE COURT PROCEEDINGS HARMFUL TO A NATIONAL POLICY ADMINISTERED BY THAT AGENCY.

Section 2283 of the Judicial Code prohibits a United States court from granting

> an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Though this language is broad, this Court has determined that it does not apply to suits by the United States to restrain state court action which threatens "irreparable injury to a national interest," *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 225-

226, even though such suits may not fall within one of the stated exceptions to the Section. Section 2283 is a revision of earlier provisions of federal law which had been authoritatively interpreted to allow such federal injunctions. *E.g.*, *Bowles* v. *Willingham*, 321 U.S. 503. In *Leiter*, the Court ruled that

> The frustration of superior federal interests which would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone. * * * [352 U.S. at 226.]

Similarly severe frustration of federal interests would ensue from precluding agencies of the United States from obtaining stays of state court proceedings impinging on matters subject to their authority, as the state court proceedings did with respect to the Labor Board's authority here; and so the purpose to permit such frustration, too, cannot be imputed to Congress from the general language of Section 2283 alone.

A. *Prior to the enactment of Section 2283, its predecessors permitted suit by any federal authority seeking to enjoin state court action interfering with federal interests.*

As this Court has made clear as recently as last Term, Section 2283 is merely the most recent statement of a principle which has restricted the authority of the federal judiciary since the nation's birth. *Younger* v. *Harris*, 401 U.S. 37, 43-44; see also *At-*

lantic Coast Line R. Co. v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 282-283, 285-287. As these opinions show, the principle was enacted into law to reduce the opportunities for "conflicts and frictions" in our unique dual court system by restraining litigants with a choice of forum from trying to provoke the federal and state courts into wasteful battles over the control of particular cases. *Id.* at 286. For most litigants, the federal courts are an unusual or alternative forum, the more remote of the two essentially separate legal systems available to them; it is important to assure that that forum is not used to frustrate the course of justice in state courts equally available to them.

For the federal government and its agencies, however, the federal court system is the system of usual, if not exclusive, jurisdiction; in the ordinary course, they may be sued, if at all, only there,[3] and federal

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[3] Indeed, actions against the National Labor Relations Board have been dismissed on the ground that the suit is against the United States which cannot be sued without the consent of Congress. *Clover Fork Coal Co.* v. *National Labor Relations Board*, 107 F. 2d 1009 (C.A. 6); *Biggs* v. *National Labor Relations Board*, 38 LRRM 2728 (N.D. Ill.). So have suits against similar agencies of the federal government: *Blackmar* v. *Guerre*, 342 U.S. 512, 515 (War Assets Administration); *Simons* v. *Vinson*, 394 F. 2d 732, 736 (C.A. 5) (Department of Interior and Bureaus of Land Management and Indian Affairs); *Cotter Corp.* v. *Seaborg*, 370 F. 2d 686, 691-692 (C.A. 10) (Atomic Energy Commission); *Soderman* v. *United States Civil Service Commission*, 313 F. 2d 694, 695 (C.A. 9), certiorari denied, 372 U.S. 968 (Civil Service Commission); *Evans* v. *United States Veterans Administration Hospital*, 391 F. 2d 261, 262 (C.A. 2) (Veterans Administra-

courts are expressly given jurisdiction over all suits brought by the United States and by its agencies which have authority to sue. 28 U.S.C. 1345. In recognition of this distinction in posture, and of the rather different considerations of federalism which apply when the national government or its agencies sue, as we show within, it was uniformly held that the predecessors of Section 2283 did not prohibit suits by federal authorities seeking to stay or enjoin state court action interfering with federal interests.

The recent insistence on a strict adherence to the provisions of Section 2283 first appeared in Mr. Justice Frankfurter's opinion for the Court in *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, a case in which a federal injunction was sought to stay state court proceedings being conducted in alleged disregard of a prior federal court adjudication of the dispute between the parties. *Toucey* discusses at great length the legislative and judicial history of what was then Section 265 of the Judicial Code. Significantly for this case, *Toucey* was an action entirely between private litigants and, indeed, it appears that each of the cases cited and discussed in the opinion may be similarly characterized. The exception to Section 265 for federal injunctions sought by the United States had been recognized and discussed in an article on which considerable reliance was placed in *Toucey*.

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tion); *Holmes* v. *Eddy*, 341 F. 2d 477, 479 (C.A. 4) (Securities and Exchange Commission).

See also *Gala-Mc Arts, Inc.* v. *Laiben*, 37 LRRM 2134 (E.D. Mo.) (Board Regional Director entitled to governmental immunity against suits for damages for acts performed in the course of official duties).

Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1192-1194 (1933); see 314 U.S. at 131, 133.[4] Yet the exception was nowhere discussed in the opinion.

Whether there was an exception for injunctions sought from a federal court by an agency of the United States to stay state court proceedings threatening interference with federal policy became a subject for dispute almost immediately after *Toucey* was decided, in connection with the Emergency Price Control Act of 1942. In *Brown* v. *Wright*, 137 F. 2d 484 (C.A. 4), the Administrator of the Office of Price Administration sought to enjoin a landlord's use of state court eviction proceedings to enforce allegedly excessive rents. Judge Parker, for the court, found, first, that the Administrator had no obligation to submit or become a party to the state court proceedings. Turning to the question of Section 265, he held (p. 488):

> [W]e do not think that section may properly be construed as forbidding the granting of an injunction to restrain interference by state courts with the enforcement of a federal statute by an agency to which Congress has delegated exclusive power to enforce it. The purpose of that section was to avoid unseemly conflict between the state and federal courts in ordinary litigation between private litigants, not to hamstring the federal government in the use of its own

[4] The article states the authors' considerable debt to Professor Frankfurter, as he then was. 42 Yale L.J. 1169 n. *.

courts in the protection of its rights or the enforcement of its laws. The statute * * * should have no application to injunctions issued to protect property of the federal government or the exercise of power which Congress has delegated exclusively to a federal agency. See United States v. McIntosh, D.C., 57 F. 2d 573. It is a matter of necessity, as well as of constitutional declaration, that the Constitution of the United States and laws passed pursuant thereto be the supreme law of the land; and it was never the intention of Congress, we think, that the power of the federal government to enforce its laws in its own courts should be limited with respect to the use of injunctions. * * *

* * * If the Administrator were denied injunctive relief from threatened violation because of the pendency of state court proceedings and were required to intervene in such proceedings for relief, resulting delays might well render the act nugatory in states not in sympathy with the legislation. The federal government is not so impotent that it must depend upon instrumentalities of the states for the enforcement of legislation so vital; and it is not to be presumed that a general statute limiting the power of federal courts to issue injunctions was intended to apply to such cases. * * * [137 F. 2d at 488.]

Other lower federal courts reached similar conclusions in other cases brought by the government or one or another of its agencies to enforce public policy.[5] *E.g.*, *Okin* v. *Securities and Exchange*

[5] No exception exists where the government is asserting an essentially private right. Such was the situation in *United States* v. *Parkhurst-Davis Co.*, 176 U.S. 317, a very brief

Commission, 161 F. 2d 978, 980 (C.A. 2); *Bowles* v. *Hayes*, 155 F. 2d 351, 355 (C.A. 3); *Henderson* v. *Fleckinger*, 136 F. 2d 381 (C.A. 5); *Western Fruit Growers* v. *United States*, 124 F. 2d 381 (C.A. 9); *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9); *In re Securities and Exchange Commission*, 48 F. Supp. 716 D.Del.). Neither Section 265 nor its restrictive interpretation in *Toucey* was found to foreclose such relief, since the considerations of federalism and of preventing private forum-shopping simply did not apply.

This Court in effect endorsed this line of reasoning two Terms after its *Toucey* decision, in *Bowles* v. *Willingham*, 321 U.S. 503, 510-511. That case also arose under the Emergency Price Control Act of 1942. Although that Act authorized a variety of proceedings for injunction to restrain violations of the Act, and vested a designated special federal court with exclusive jurisdiction over actions against federal authorities under the Act, it nowhere expressly stated that federal authorities could seek injunctive relief against state court proceedings. Any such exception to Section 265 would have to be implied. And

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opinion which turned on the government's concession for the first time in this Court that certain Indian lands were within state, not federal, jurisdiction; that the government had no "public" interest in the case; and that the Indians on whose behalf it was suing would be able to defend on their own behalf in the state action sought to be enjoined. Taylor & Willis, *op. cit. supra*, 42 Yale L.J. at 1183; *United States* v. *Inaba*, 291 Fed. 416, 417 (E.D. Wash).

as the Fourth Circuit had done in *Brown* v. *Wright*, *supra*, this Court implied the exception:

> We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118. In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate *as implied legislative amendments* to it. 314 U.S. pp. 132-134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942. * * * [By creation of a special federal court of exclusive jurisdiction,] Congress * * * preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts. The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities (*Toucey* v. *New York Life Ins. Co.*, *supra*) thus does not come into play. [321 U.S. at 510-511; emphasis added.][6]

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[6] In *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511, a suit between private parties which we discuss *infra*, pp. 20-21, 26-28, the Court denied that this passage stood for the proposition that there was a general exception to Section 265 in areas of regulation preempted by Congress. 348 U.S. at 515, n. 2. We accept that interpretation since our argument is only that the Board as federal administrator of the preempted subject—not any private party—may seek injunctive relief against state court action. It is clear, however, contrary to an implication in the *Richman Brothers* opinion, *ibid.*, that the Emergency Price Control Act stated no express exception to the rule of Section 265. Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726, 739 (1961). That exception had to be "implied," 321 U.S. at 510, and was implied, in part, on the basis that the existence of a preempted area made it essential that the

B. *Neither Section 2283 nor its subsequent interpretation prohibits suits by federal authorities seeking to enjoin state court action interfering with federal interests.*

Section 2283 was enacted as part of the overall consolidation and revision of the Judicial Code in 1948. It is essentially a continuation of the prior law, as this Court has repeatedly recognized. *Younger* v. *Harris, supra; Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers, supra.* Although it embodies a more precise statement of the exceptions to the anti-injunction rule than the prior statutes, no suggestion may be found in the Reviser's Notes or its other legislative history that it was intended to have any effect on the previously recognized exception for injunctions on behalf of federal officials enforcing federal policies. Cf. H. Rep. No. 308, 80th Cong., 1st Sess., A 181-A 182; Moore, *Commentary on the U.S. Judicial Code*, 396-397 (1949). Given the sweeping nature of the revision of the Judicial Code of which Section 2283 was a part, and the importance to the federal government and its agencies of the power reflected in the opinions cited above, an intent to change the prior law could not be lightly assumed. See *National Labor Relations Board* v. *New York State Labor Relations Board*, 106 F. Supp. 749 (S.D.N.Y.).

Section 2283 was before this Court on three occasions over a short span of years in the early 1950's.

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federal authority charged with administering the area be able to enforce the exclusive nature of the remedies Congress had provided.

The first of these cases was *Capital Service, Inc.* v. *National Labor Relations Board*, 347 U.S. 501; it involved a question closely related to that raised here. An employer had there invoked both a state court and the Labor Board against union picketing which included both secondary boycott and protected activity. The Board's Regional Director sought a federal court injunction against the prohibited secondary activity, pursuant to Section 10(l) of the Labor Act, 29 U.S.C. 160(l), and at the same time sought to enjoin the employer from enforcing the injunction he had obtained from the state court—an injunction which forbade protected as well as unlawful picketing. The latter injunction was challenged in this Court as contrary to Section 2283. This Court concluded that the injunction was necessary in aid of the district court's jurisdiction under Section 10(l), and thus did not have to reach the question whether it would have been proper otherwise.[7] The Court did make clear, however, that Section 2283 was the only possible barrier to the relief sought:

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[7] The Court's construction of the "necessary in aid" language of Section 2283 was a broad one. As is the case here, the basis for objection to the state court injunction was that it prohibited activity which the federal labor laws permitted, not that it duplicated relief which Section 10(l) permitted federal courts to give. It may be doubted whether the Board would ever have sought to suspend a state court injunction limited to secondary or violent activity; no such relief was sought in the present case. Since Section 10(l), as such, gave the district court authority only to enjoin secondary behavior, the conclusion that it was "necessary" to this jurisdiction for it to be able to interfere with orders prohibiting protected primary behavior was a generous one.

> In absence of a command of the Congress to the contrary, the power of the District Court to issue the injunction is clear. Federal courts seek to avoid needless conflict with state agencies and withhold relief by way of injunction where state remedies are available and adequate. See *Alabama Commission* v. *Southern R. Co.*, 341 U.S. 341. But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. * * * [347 U.S. at 504.]

The next case was *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511. In this case, too, an employer obtained an anti-picketing injunction from a state court, although in this instance it seems to have been assumed that the picketing in question constituted an unfair labor practice rather than protected activity. Here, however, it was not the Board but the union which sought to have a federal court require the state court to lift its injunction. The union was a party in the state court proceedings, albeit the injunction there—because it was temporary—was not appealable under state practice. On this basis, the lower court had distinguished the cases in which the Board itself had sought such relief, and held that Section 2283 barred any private party from obtaining an order requiring the state courts to lift anti-labor injunctions. 211 F.2d 449 (C.A. 6).

On writ of certiorari in this Court, the argument focused on the private nature of the relief sought. No. 173, O.T., 1954, Pet. Br. 23-25; Memorandum for the National Labor Relations Board as *amicus curiae*, 7-11; Resp. Br. 13, 16-17. The Court specifically limited its statement of the question considered to whether such relief could be obtained "at the request of one of the private parties." 348 U.S. at 514. That limitation permitted it to state, as it otherwise could not have stated, *supra* pp. 14-16, that "no * * * exception [for such orders] had been established by judicial decision under former § 265." 348 U.S. at 515. For the exception in favor of the federal government and federal agencies had been called to the Court's attention in the briefs, *supra*, and indeed had been recognized in a recent decision in which the author of many of these opinions, Mr. Justice Frankfurter, had participated as Circuit Justice. *International Union of Electrical, Radio and Machine Workers* v. *Underwood Corp.*, 219 F.2d 100, 101-103; NLRB Mem. *supra*, at 7-8. The federal exception was not discussed as such in *Amalgamated Clothing Workers;* but the Court repeatedly stated, in effect, that any authority to secure injunctive relief was "vested in the Board and not in private parties." 348 U.S. at 517, 520.

The third of this series of opinions, also written by Mr. Justice Frankfurter, and in this case for a unanimous Court,[8] was *Leiter Minerals, supra.* It

[8] The decision in *Amalgamated Clothing Workers* commanded the votes only of Justices Frankfurter, Reed, Burton, Clark and Minton; Chief Justice Warren and Justices Black and Douglas dissented; Justice Harlan took no part in the decision.

addressed the question which had been left open in *Capital Service, Inc.* and *Amalgamated Clothing Workers, supra*, and held that an exception to Section 2283 would be implied where the injunctive relief against state court action was sought by public authority. The state court action in that case had been brought by Leiter Minerals against a mineral lessee of government land, claiming that Leiter Minerals in fact was the owner of the mineral rights to the land. The United States, the owner of the land, was not a party to this action; it instituted a quiet title action in the federal district court and sought to enjoin continued prosecution of the state court proceedings. As it had in *Capital Service*, the Court found "no doubt, apart from the restrictions of 28 U.S.C. § 2283, of the right of the United States to enjoin state court proceedings whenever the prerequisites for relief by way of injunction be present." 352 U.S. at 225.

Turning to Section 2283, the Court invoked as a rule of construction the principle that

> statutes which in general terms divest pre-existing rights or privileges [that is, rights that would exist apart from the statute,] will not be applied to the sovereign without express words to that effect. [352 U.S. at 224, 225.][9]

The Court found neither legislative history nor policy bases for subjecting the federal government to the

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[9] It previously had relied on this rule in *United States* v. *United Mine Workers*, 330 U.S. 258, 272; and Justice Frankfurter's proteges had earlier invoked the same rule to explain the federal exception to Section 265. Taylor & Willis, *op. cit. supra*, 42 Yale L.J. at 1193-1194.

restrictions of Section 2283. It found just the contrary, that there was

> a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone. * * * [T]he interpretation excluding the United States from the coverage of the statute seems to us preferable in the context of healthy federal-state relations. [352 U.S. at 225-226.]

This portion of the opinion is not at all dependent on the particular facts of the case. The government was in the position of an indispensable, but unavailable, party defendant in the state case, and the Court might have limited its interpretation of Section 2283 to such circumstances. That consideration is discussed, however, only in deciding whether the government had established its right to the injunctive relief which, it had now been decided, Section 2283

did not disable the federal court from affording it. 352 U.S. 226-228. Similarly, as the court below observed, A. 57, n.3, whether federal injunctive relief would be appropriate in the present case, assuming it could be granted, is an issue which has not yet been reached. What is at issue now is the power of the district court to grant such relief, and under *Leiter Minerals* that issue does not depend upon the type of federal interest which the government asserts. "It is * * * difficult to see how the nature of the interests the United States asserts can make a difference so long as the United States asserts them. * * * We are unaware that Congress even considered the applicability of section 2283 to the United States, much less that it distinguished between the type of rights the United States may happen to assert." *United States* v. *Wood*, 295 F. 2d 772, 779 (C.A. 5), certiorari denied, 369 U.S. 850.

Leiter Minerals, of course, concerned the United States, not a federal agency, and the decision below made this a governing consideration. Yet the cases recognizing the governmental exception under Section 265, including *Bowles* v. *Willingham*, *supra*, made no such distinction; the power to secure an injunction to protect important federal interests against incursion by state court action was found to be implicit in the broad mandate of enforcement given the federal administrator, as it is in the case of government itself. See also *National Labor Relations Board* v. *Roywood Corp.*, 429 F. 2d 964, 970 (C.A. 5); cf. *Federal Trade Commission* v. *St. Regis*

Paper Co., 304 F. 2d 731, 733-734 (C.A. 7).[10] No reason suggests itself why an administrator of federal policy who may bring suit in the name of the United States, such as the Administrator of the Federal Aviation Administration,[11] should be free of the restrictions of Section 2283, but the administrators of equally important federal policies who must sue in the name of an agency, such as the Labor Board, should be subject to those restrictions.

C. *Section 2283 permits suits by federal officers to enjoin state court action in any case in which public, as distinct from private, right is being asserted.*

We believe that the appropriate reconciliation of the principles stated in this Court's prior holdings is to find an exception in Section 2283 for any action brought by federal officers to vindicate a public, as distinct from a private, right. Cases permitting injunctions against state court actions, such as *Leiter*

[10] In that case, the St. Regis Paper Co. had obtained an order in the state court restraining an accountant from producing information which the Commission had subpoenaed. The Commission applied for enforcement of its subpoena in federal district court, simultaneously seeking a stay of the state order. Such relief was found to be in aid of the district court's jurisdiction to enforce Commission subpoenas, but the conclusion rested essentially on the importance of the Commission's powers, and the interference with federal regulation which might occur if such relief could not be given; the Commission has no express statutory authority to seek such relief.

[11] In *United States* v. *City of New Haven*, Civ. No. 14264, D. Conn., the Federal Aviation Administration is seeking an injunction staying a state court injunction restricting the use of navigable air space. Cf. *American Airlines* v. *Town of Hempstead*, 398 F. 2d 369 (C.A. 2), certiorari denied, 393 U.S. 1017.

Minerals and *United States* v. *Wood*, *supra*, have emphasized the public aspect of the right sought to be vindicated; [12] the one case in this Court in which the United States was denied injunctive relief under Section 265 is readily characterized as one in which the government was asserting an essentially private claim. *United States* v. *Parkhurst-Davis Co.*, p. 15, n. 5 *supra*.

Amalgamated Clothing Workers presents no obstacle to such an analysis. It was strongly contended in that case that the policy of national preemption of state labor regulation, where applicable, was so strong as, in itself, to require an exception to Section 2283; it was asserted on behalf of the union in that case, that private litigants should be considered private attorney generals, in effect, empowered to assert that policy against the states through the federal courts. But private litigants who assert the public interest may often do so for their own private purpose. Cf. *L. Singer & Sons* v. *Union Pac. R. Co.*, 311 U.S. 295, 304. The necessity of invoking a federal court to interfere with state court proceedings is not

[12] *Wood* was a civil rights case in which the government sought an order enjoining state criminal proceedings on the ground that the prosecution in question, regardless of its outcome, would intimidate Negroes generally in the exercise of their right to vote in the state. In finding that Section 2283 did not bar this claim for relief, the court stressed that the government was not asserting the rights of the defendant —who it assumed would obtain a fair trial—but rather the rights of all Negro citizens of the area under the Civil Rights Act of 1957 to vote or register to vote without intimidation, threat, or coercion; these latter rights the Attorney General was directed by the statute to enforce. 295 F. 2d at 779-781.

established merely by the existence of a preemption doctrine; as the Court stated in its opinion, the line of demarcation between federal and state jurisdiction is "subtle" and the Court's statements regarding the area of exclusive federal jurisdiction are "hedged with qualifications." 348 U.S. at 519. In many cases, it will be appropriate to leave resolution of the issue to the state courts; to permit the federal courts to interfere at the behest of any interested private party not only threatens a possibly unnecessary multiplication of court proceedings, but also adds "an element of federal-state competition which may be trusted to be exploited and to complicate, not simplify, existing difficulties." *Ibid.*

These problems are avoided where the decision to seek injunctive relief is made by public authority. Where it is public authority which asserts the exclusiveness of a federal remedy or which puts forward views of federal policy, one has an assurance not otherwise possible that allegations of public policy are not being used to cloak delay or partisan advantage. For the federal government and its agencies, unlike private parties, the federal courts are the forum of choice; [13] for them, as this Court recognized in *Leiter Minerals*, access to the federal courts is "preferable in the context of healthy federal-state relations." 352 U.S. at 226.

Moreover, a federal agency's invocation of injunctive relief on the ground of "frustration of superior

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[13] In cases where it supports the defense, as was true in *Leiter* and in this case, the federal authority could not be made a party in the state court action. See p. 12 and n. 3, *supra*.

federal interests," *ibid.*, automatically carries with it a certain definition of the federal interest which would be lacking in private litigation. That is, the fact that the federal agency has found it important to sue is *in itself* a determination of federal policy which—given the agency's mandate and expertise—is entitled to weight and respect. What is being asserted, as here, is not merely preemption or federal policy in the abstract, but also a concrete finding by the responsible officials of the importance of intervention in the particular case to protect "superior federal interests." In this case, for example, the Board acted to prevent state interference with labor activity which the federal act has designed to be free, and to foreclose an employer's evasion of the Board's exclusive jurisdiction over these activities, *infra* pp. 33-35. While the propriety of injunctive relief remains for the court to decide, as in *Leiter Minerals*, this added factor suffices to take the case outside *Amalgamated Clothing Workers*.

II. THE NATIONAL LABOR RELATIONS BOARD IS ENTITLED TO BE HEARD ON ITS APPLICATION FOR INJUNCTIVE RELIEF IN THIS CASE.

The cases discussed above make clear that Section 2283 is the only possible barrier to a hearing of the claim for injunctive relief. In *Capital Service*, the Court said that, "where Congress * * * has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal

right * * * [in the absence of a command of the Congress to the contrary]." 347 U.S. at 504. And in *Leiter Minerals*, as well, it found "no doubt, apart from the restrictions of 28 U.S.C. § 2283, of the right of the United States to enjoin state court proceedings whenever the prerequisites for relief by way of injunction be present." 352 U.S. at 225. If the governmental exception to Section 2283 extends to federal agencies such as the National Labor Relations Board, the Board is entitled to be heard on its claim.

Any contention apart from Section 2283 that the Board lacks authority or standing to bring this suit must fail. Although the only express statutory provision for Board authority to seek injunctive relief is that contained in Sections 10(j) and 10(l) of the Act, 29 U.S.C. 160(j), (l), to seek such relief against employers or unions after a charge of unfair labor practices has been made or a complaint has been issued,[14] the Board's authority to enforce the exclu-

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[14] There was no means by which the Board could have linked its federal court suit against the state court proceeding to a suit under Section 10(l) or (j) of the Act. Section 10(l) provides that, upon the filing of a charge that a union has engaged in secondary boycott or picketing activity violative of Sections 8(b)(4) or 8(b)(7) of the Act, 29 U.S.C. 158(b)(4), (7), the Board's Regional Director, if he finds reasonable cause to believe that the charge is true, shall file a petition in a federal district court for an injunction against such activity pending a final adjudication by the Board. Section 10(j) provides similar authority in respect to other unfair labor practice conduct.

The Company did not file charges with the Board claiming that the Union's picketing violated Sections 8(b)(4) or 8(b)(7) of the Act, and, even if it had, the charges would undoubtedly have been dismissed, for the picketing, far from

sive nature of the federal scheme is readily implied. Indeed, the Court clearly took that step in *Capital Service*, *supra*, as it had in another context in *Bowles* v. *Willingham*, *supra*. In neither of those cases did the federal administrator have express authority to seek injunctive relief against preempted state action; yet, because "the intrusion of a state would result in conflict of functions," 347 U.S. at 504, the Court easily implied the authority to seek it "in order to preserve the federal right." *Ibid.*; see also, *United States* v. *Wood*, *supra*.

Congress has not made an express grant of authority for Board institution of, or participation in, every legal proceeding that may be required in the performance of its obligation to administer the Act. Cf. *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793, 798. The absence of any such provision, however, has never been deemed to require that the Board's authority be narrowly confined to the precise judicial procedures described in the Act. On the contrary, where proper discharge of the Board's responsibilities under the Act cannot

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violating those Sections, is privileged under the Act (n. 16, *infra*). Hence, there was no basis for seeking an injunction under Section 10(l) of the Act. Moreover, since the Board has held that an employer's resort to a court to enjoin activity protected by Section 7 does not violate Section 8(a)(1), 29 U.S.C. 158(a)(1), *Clyde Taylor*, 127 N.L.R.B. 103, 109, a charge against the Company for interfering with that activity would lie only if it had resorted to the "unsatisfactory remedy of using 'self-help,'" *Int'l Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 202 (concurring opinion of Mr. Justice White). Accordingly, there was likewise no basis for obtaining an injunction under Section 10(j).

be accomplished by resort solely to the statutory remedies expressly provided, the Act by implication authorizes the Board to seek other appropriate and traditional legal remedies in order to prevent frustration of the Act's purposes.[15] See *e.g.*, *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25 (power to appear in bankruptcy proceedings and file claims therein); *In re National Labor Relations Board*, 304 U.S. 486 (power to petition for writ of prohibition against premature invocation of court of appeals' reviewing jurisdiction); *Auto Workers* v. *O'Brien*, 339 U.S. 454 (power to appear in this Court as *amicus*, in state litigation involving subject matter preempted by the Act); *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (power to institute contempt proceedings for violation of decrees enforcing Board orders); *Home Beneficial Association* v. *National Labor Relations Board*, 172 F. 2d 62, 63 (C.A. 4), and *National Labor Relations Board* v. *Bird Machine Co.*, 174 F. 2d 404, 406 (C.A. 1) (power to conduct supplemental administra-

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[15] This principle has long been recognized as applicable both to the United States and its agencies in order to establish their capacity to bring suit, although not specifically authorized by statute, "for the purpose of protecting and enforcing * * * governmental rights and to aid in the execution of * * * governmental policies." *Griffin* v. *United States*, 168 F. 2d 457, 459-460 (C.A. 8). See *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 204; *United States* v. *California*, 332 U.S. 19, 26-29; *United States* v. *Minnesota*, 270 U.S. 181, 194; *Cotton* v. *United States*, 11 How. 229, 231; *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775, 779 (C.A. 2); *United States* v. *LeMay*, 322 F. 2d 100, 103 (C.A. 5).

tive proceedings after entry of enforcement decree); *National Labor Relations Board* v. *New York Labor Relations Board, supra* (power to seek injunction against state regulatory agency invading the Board's exclusive unfair labor practice jurisdiction); *National Labor Relations Board* v. *Industrial Commission of Utah*, 84 F. Supp. 593 (D. Utah), affirmed *per curiam*, 172 F. 2d 389 (C.A. 10) (power to seek injunction against state regulatory agency invading Board's exclusive jurisdiction to conduct representation proceedings); *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9) (power to seek injunction to prevent attachment of back pay awards following enforcement of Board decree).

Similar implications have been made with respect to other federal regulatory agencies. The Federal Trade Commission, in view of its mandate to enforce the Clayton Act, has been held entitled to seek a stay of a merger pending its action, although no explicit authority for that remedy appears. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 605-612. The Securities and Exchange Commission, because of its "interest in the maintenance of its statutory authority and the performance of its public duties", has been held to have authority, although not expressly granted it, to intervene "to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it." *Securities and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U.S. 434, 460. The Wage and Hour Administrator's authority to apply to a federal district court for an injunction to en-

force an industry wage order has been upheld, even though the Fair Labor Standards Act does not expressly so provide, on the ground that such authority was essential "in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted." *Walling* v. *Brooklyn Braid Co.*, 152 F. 2d 938, 940-941 (C.A. 2). In sum, capacity in the United States or one of its agencies to seek the injunctive aid of a court of equity is implied, unless the applicable statutory provisions forbid, where such action is required "in removing unlawful obstacles to the fulfillment of its obligations." *United States* v. *Minnesota*, 270 U.S. 181, 194.

The district court's jurisdiction was properly invoked under 28 U.S.C. 1337, which confers jurisdiction in the district courts over all civil actions arising under federal legislation regulating commerce. And the Board's complaint is supported by a justiciable interest on its part in removing an unlawful obstacle to the fulfillment of Congress' objectives.

In enacting the National Labor Relations Act, Congress desired to "obtain uniform application of [the Act's] substantive rules and to avoid [those] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. Consequently, it "entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience * * *." *San Diego Bldg.*

Trades Council v. *Garmon*, 359 U.S. 236, 242; *Amalgamated Association of Street, Electric Railway & Motor Coach Employees* v. *Lockridge*, No. 76, O.T., 1970, decided June 14, 1971, slip op. 12-14. The federal regulatory scheme operates by defining some activities to be "protected" and some practices to be prohibited, leaving other conduct to the free play of economic forces. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner*, *supra*, 346 U.S. at 499-500; see also *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 260. The state court injunction here clearly impinged on an "area of labor combat designed to be free."[16] Hence, in bringing suit to re-

[16] The state's right to enjoin mass or violent picketing does not justify a ban on all picketing or other forms of peaceful concerted activity. See *Youngdahl* v. *Rainfair*, 335 U.S. 131, 139-140; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-735. The injunction here limits the picketing to bona-fide members of the Union, and then only to those who submit themselves to the jurisdiction of the state court; prohibits the pickets from "[i]nstigating conversations with [the Company's] customers in any matter relating to the dispute herein"; and bars persons other than qualifying pickets from causing "to be published or broadcast any information pertaining to the dispute between the parties hereto" (*supra*, pp. 4-5). These provisions restrict the exercise of peaceful concerted activity to a greater extent than does, and thus conflict with, the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538; *Tyree* v. *Edwards*, 287 F. Supp. 589 (D.C. Alaska), affirmed, 393 U.S. 405; *Garner* v. *Teamsters Union*, *supra*, 346 U.S. at 499-500; *National Labor Relations Board* v. *Servette*, 377 U.S. 46; *National Labor Relations Board* v. *Fruit & Vegetable Packers*, 377 U.S. 58. Moreover, the state injunction also

move that impingement, the Board, no less than the Government in *Leiter*, was seeking to prevent "irreparable injury to a national interest" (352 U.S. at 225-226)—*i.e.*, to protect the federal system of regulation which Congress has fashioned.

The supremacy of the Act in the field which it occupies could be readily impaired unless the Board were empowered to take appropriate legal steps to check encroachments on its exclusive jurisdiction. Thus, were the Board unable to seek elimination of such encroachments by a state court, their elimination would depend entirely upon such fortuitous factors as whether the defendant contested the state court action on the ground of federal supremacy, or whether the defendant had the desire and the funds to appeal the action to a higher state court, and, if need be, to this Court. Without power in the Board to take appropriate steps to vindicate the federal regulatory authority, an absence of any one of these factors would result in effective state interference with the Board's exclusive jurisdiction. The Board "'as the representative of the public has an interest apart from that of the individuals affected.'" *Hopkins Federal Savings & Loan Ass'n* v. *Cleary*, 296 U.S. 315, 339-340; see also *National Labor Rela-*

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enjoins the pickets from "[d]oing any act in violation of Sections 28-812, 28-814.01 and 23-814.02 R.S. Neb. 1964" (*supra*, p. 5). These provisions (App., *infra*, pp. 41-43) not only ban mass picketing and acts of physical coercion against persons desiring to work, but also "loitering about, picketing or patrolling the place of work * * * of such person * * * against the will of such person." The breadth of these provisions tends to chill the exercise of purely peaceful picketing. See *Thornhill* v. *Alabama*, 310 U.S. 88, 99-101, 104-105.

tions Board v. *Roywood Corp.*, *supra*, 429 F. 2d at 970.[17] There is no reason to suppose that Congress meant in this situation to depart from the basic purpose of entrusting "the vindication of the desired freedom of employees * * *, by reason of the recognized public interest, to the public agency the Act creates," and to permit a haphazard enforcement of the law in local tribunals by private litigants whose interests do not extend beyond their adversary status. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 266 see *United States* v. *Borden Co.*, 347 U.S. 514, 518-519.

There were only two means available by which the Board could eliminate the interference with activity preempted by the National Labor Relations Act which occurred here. It could have intervened in the state court suit, assuming such intervention would have been permitted, and sought, through appeal within the state court system and ultimately to this Court, to have the unlawful portion of the injunction vacated. This can be a time-consuming process, which, even if it ultimately resulted in a modification of the injunction, could not eliminate

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[17] It is this public interest which distinguishes this case from such cases as *Nathanson* v. *National Labor Relations Board*, *supra*, and *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U.S. 81, on which the court below relied. In *Nathanson*, this Court found, for the purposes of bankruptcy priority, that in presenting claims for back pay the Board was asserting essentially private rights (344 U.S. at 27-28); in *Reconstruction Finance Corp.*, the Court permitted costs to be taxed against the corporation, although it was an agency of government, because "its transactions are akin to those of private enterprises." 312 U.S. at 88.

the undue advantage in the labor dispute which the Company had obtained during the time the state injunction was operative.[18] Or, the Board, as it did here, could have brought an independent federal court suit to nullify the force of the state court injunction. Authority for either step must be implied. Once it has been implied, for all the reasons stated above, Section 2283 poses no barrier to the second alternative if the Board finds that a preferable mode of proceeding.

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[18] As the district court here recognized (A. 50):

> It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is particularly relevant here where picketing activities are involved and * * * Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

See also *National Labor Relations Board* v. *Roywood Corp.*, *supra*, 429 F. 2d at 968.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to remand it to the district court for consideration on the merits of the injunction sought by the Board.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

EUGENE G. GOSLEE,
Acting General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

JEROME N. WEINSTEIN,
Attorney,
National Labor Relations Board.

JULY 1971.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> SEC. 3. (a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. * * *
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> SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. * * *
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> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such

cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such

charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. * * *

The relevant portions of the Nebraska anti-picketing statutes, Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964 provide, as follows:

28-812. *Picketing, defined; unlawful.* It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, in-

decent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purposes; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the place of work or residence of such person, or any street, alley, road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

* * * *

28-814.01. *Mass picketing; unlawful.* It shall be unlawful for any person, singly or in concert with others, to engage in or aid and abet any form of picketing activity that shall constitute mass picketing as defined in section 28-814.02.

28-814.02. *Mass picketing; definition display of sign required.* (1) Mass picketing means any

form of picketing in which there are more than two pickets at any one time within fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

(2) Any person who shall legally picket by any means or methods other than forbidden in this section or in section 28-812 shall visibly display on his or her person a sign showing the name of the protesting organization he or she represents. The composition of the sign shall be upper case lettering of not less than two and one half inches in height.

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